1944

# E. J. Huber and Ralph Dunkley v. Victor Newman : Petition for Rehearing and Brief

Utah Supreme Court


O. H. Matthews; P. G. Ellis; Attorneys for Appellant;

# In the
# Supreme Court of the State of Utah

E. J. HUBER and
RALPH DUNKLEY,
*Plaintiffs and Appellees,*

vs.

VICTOR NEWMAN,
*Defendant and Appellant.*

Case
No. 69166

## Petition for Rehearing and Brief

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## CASE CITATIONS

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## Petition for Rehearing

Appellant Victor Newman respectfully petitions the Honorable Supreme Court for a rehearing of his appeal from the district court judgment of $19,451.03 and for a reversal of said judgment with directions for a new trial, upon the ground that this Court in its opinion and judgment herein erred as follows:

1. In treating *Benson* v. *Rozelle,* 85 Utah 582 as overruled and displaced by *Gibbs* v. *District Court,* 86 Utah, 314, whereas in both the Gibbs case and this case the Court distinguished the Rozelle case and left it in force within the scope thereof.

2. In treating the Gibbs case procedure as sustaining the judgment appealed from herein, whereas said judgment is reprobated thereby.

3. In holding the "Findings of Fact" by the Court (rec. p. 83-90) to be complete and responsive to all the issues, and adequate to sustain the judgment appealed from, whereas said findings do not respond to all the issues nor suffice on their face to sustain the judgment complained of.

4. In failing to observe and hold that the paper denominated as the report of the referee, in paragraphs 2, 5 et seq. of the court's findings of fact, was and is null, void and of no effect whatever by reason of recitals on the face thereof and on the face of the accompanying record, showing that it was not the product or consumation of any trial by the referee, judicially conducted according to law in the presence of the parties or their attorneys of record, or pursuant to any notice to said parties or attorneys of the time or place at which a trial would be commenced; that no such notice was ever given, and no such trial was ever had; and no evidence under oath of any witness was ever given in the presence of the parties or their attorneys, or otherwise or at all, as required by the provisions of Utah Annot. Code 1943, 104-27-6; by Utah Const. art. 1, sec. 7, or by U. S. Const. 14th amendment section 1; or U. S. Const. 5th amendment. Thereby appellant was deprived of due process of law in the trial and adjudication of the facts of this case, and the conclusions of law to be drawn therefrom, and in the judgment that resulted therefrom.

5. In failing to observe and hold that the so-called referee in so proceeding contrary to law was not in fact or law a judicial tribunal nor functioning as such, and was without jurisdiction or judicial power to act as a referee or find or adjudicate the facts upon which the district court could render or enter any judgment against appellant, nor could the district court amend, add to, or adopt said void report or findings of the referee, in whole or in part.

6. In failing to observe and hold that, independently of said void report of the referee there was not any evidence whatever by oral testimony of any witness, or otherwise, or at all, to support a finding of fact or conclusion of law that appellant owed the appellees $19,451.03, or $13,386.37, or any sum or amount whatever. There was no proof of debits or credits in favor of or against either appellant or appellees, in accounting, nor any evidence upon which a balance could be struck or computed in favor of either party to this action against the other; nor any lawful finding or adjudication of facts showing any such debits, credits or balance upon which any judgment whatever could be lawfully rendered or entered against this appellant.

7. In resorting to the rule of decision in equity cases upon conflicting evidence supported by *Stanley* v. *Stanley*, 97 Utah, 520, 94 Pac. 2d, 465, for the reason that there is absolutely no evidence, conflicting or otherwise, showing any debits, credits or balance due either party hereto against the other; nor any adjudication or finding of facts upon which a judgment for $19,451.03 or any other amount can be supported.

8. In holding, in effect, that any judgment, judicial record, or other document that is void upon its face can be validated or given effect by the failure or neglect of a party to object thereto at any particular time or place; and in failing to hold that such void record or document remains void and may be objected to and assailed at any and all times and places, upon either direct or collateral attack, by any person against whom the same may be offered or asserted or sought to be enforced.

9. In affirming the judgment appealed from as against appellant's objections Nos. 1 to 8 hereof.

10. In affirming said judgment contrary to the provisions of Utah Code, 1943, 69-1-35 and 69-1-37 and other sections of said chapter requiring the payment of debts before distribution to firm members.

11. In holding in effect that a trial court may dispense with said statutory requirements, if it exact security or indemnity from the member who is plaintiff in accounting that he will pay his contributive share of the firm debts which the defendant member may thereafter be compelled to pay. And that the court may, after ordering such security, dispense with the same, and give judgment for a share of the gross earnings notwithstanding that plaintiff members have failed to give such security or indemnity.

12. In affirming the judgment below for $19,451.03 whereas the same is unsupported by evidence or fact finding. And for the several reasons shown in ground 1 to 11 hereof.

13. For the further reasons shown in appellant's

separate petition for modification of this court's opinion and judgment herein.

O. H. MATTHEWS,
P. G. ELLIS,
*Attorneys for Appellant.*

## APPELLANT'S BRIEF ON REHEARING

### GROUND 1

In view of Ground 2 hereof we might dispense with Ground 1 but for a duty we owe the court and the additional light thrown on ground 2 et seq.

The Court's opinion treats Benson v. Rozelle as if overruled by Gibbs v. District Court. We submit that such is not the effect of the Gibbs case, but this Court distinguished the Benson-Rozelle case and left both cases standing, each within its distinctive field. Had the two cases been deemed so much alike in fact or principle as to justify but one rule it would have been easy for this Court to have said so and to have overruled Benson v. Rozelle as a precedent in future cases. Whatever individual lawyers may think as to the distinction taken between the two cases is of no importance, in practice, since it is the prerogative of this Court to draw distinctions and declare the law in its own wisdom and discretion. It did this in the Gibbs case and told the bar and public that both cases are correct, each within its own field, and that both cases might be cited in future. This present appeal presents a complaint that is on all-fours with that in the Benson-Rozelle case, almost word for word in allegation and prayer for relief. Hence

our brief on appeal was prepared in reliance on that case. Is it proper then to defeat that reliance and to interpose the Gibbs case which this Court declared in its opinion therein to rest upon distinguishable grounds from the Benson-Rozelle case?

> "The Supreme Court is bound by its former decisions. Its former decisions are until overruled or modified binding upon the Supreme Court."
>
> *Stookey* v. *Green,* 178 Pac. 586 (Utah);
>
> "Those who transact business in the State have a right to rely upon the law as declared by the Supreme Court."
>
> *Passow* v. *Emery,* 106 Pac. 935 (Utah).

And, as this Court observed on another occasion, it is more important that the law be settled than how it is settled. The public is entitled to know with certainty. Fixity is more important than abstractions. The suspense of imperfect opinion is devastating. If the law on any subject is subject to change any day without notice, how are clients to be safely advised. It costs money, a lot of it, to litigate, and clients should not be invited to embark if the landmarks are liable to disappear before or when the case is decided.

In so speaking, we yield to no one in the respect and affection in which we hold our Supreme Court. The bench and bar are not antagonists but companions and fellow workers in the cause of applied justice. We of the bar can render our best service to the Court by cordial cooperation and clear and free exchange of views.

In Congress they have invented a Committee on Rules, which is a sort of flying squadron, empowered at any moment to get into action and improvise a rule of procedure that will cut the dykes of existing rules and turn the tide of legislation in any desired direction. That device may have its usefulness in formulating legislation, but nothing similar has heretofore been deemed appropriate in judicial procedure. This Court stands ready at all times to invalidate any statute that is ex post facto in its operation as unconstitutional. Should it do less when one of its own decisions has an ex post facto operation and effect?

Our case law is now so colossal that we do not believe it humanly possible for the members of this Court or any Court, to always have in mind the implications of all its former decisions, not to mention those of the other states and federal which are constantly being cited. It is entitled therefore to the vigilance of counsel to aid it in steering a true compass course; else the case law may drift into confusion.

One consequence of the present opinion is that it goes far to undermine not merely the Benson-Rozelle case but the far more important decision of this Court in *Evans* v. *Evans*, 98 Utah, 189; 98 Pac. 2d, 703. The decision in that case was an unusually careful and well-considered opinion by Judge Wolfe, expounding the privacy and property rights of the citizen in his books and records and their constitutional immunity from unreasonable searches and seizures. The law of that case will fall largely into discard if in this case Newman's books and records are liable to be ordered to be produced *en masse* before a referee for all

and sundry, as is purported to be done by the orders of reference in this case (rec. p. 74-75, 78-79), without any previous showing and judicial determination of a right thereto. This Court, in its decision in the Benson-Rozelle case may well have had these constitutional considerations in mind and decided the case in deference thereto, while in the Gibbs case it did not. Evans v. Evans was decided by this Court after both those cases, but the constitutional immunity expounded thereby preexisted both those cases. Benson v. Rozelle required the averment of partnership (keystone to the right of inspection of alleged partnership books and records) to be judicially determined, before the defendant could be deprived of his property rights in the privacy of his books and records and in the information they contain. The Gibbs case and the present case do not extend that protection or immunity, but order production *en masse* long prior to any attempted adjudication of the question of *partnership* and of the right to inspection. Yet, this Court pointed out in Evans v. Evans, irreparable harm and injury may occur before the error could be corrected by appeal after final judgment.

In the Gibbs case this Court say that the district court it not required *by statute* to determine matters in bar of an accounting before taking the account (which involves production of books and papers). Perhaps not. But the constitutions, state and national, which are higher than any statute, forbids an order for mass production of books and papers, such as we have here, without any previous showing of the plaintiff's right thereto and without the safeguards prescribed by this Court in *Evans* v. *Evans*,

supra. And there is no *discretion* of procedure that can justify letting down the bars in this respect. The rule in Benson v. Rozelle extends this protection against unreasonable search and seizure until the right is first adjudicated. As this Court observed in Evans v. Evans, business books and records often contain information of the utmost concern to the owner, as well as to the inquisitive eyes of competitors, or their agents or accomplices. Undue exposure thereof may spell destruction and ruin. The rule in the Gibbs case appears to let down the bars because *no statute* compels discretion. The rule in Benson-Rozelle averts harm from invasion of constitutional rights before it is done, by appeal with certiorari in aid. The rule in the Gibbs case compels resort to the writ of prohibition to avert the harm before it happens. And this Court may soon be overrun by petitions for prohibition from all over the state from litigants desiring to resist attempted piracy of their books and papers. For if, upon final decree it be adjudged that no partnership existed, the harm will already have been done without redress.

The writer of this brief was not the trial attorney. From a close reading of this record he concludes that this harm has not yet occurred in this case, but that it may be if the case ever reaches the accounting stage, or the stage at which a valid order is asked for mass production of books and papers of the defendant in order to proceed with the accounting without the showing required by this Court in Evans v. Evans. We believe that whatever investigations were made by the referee in this case were made upon books and records submitted by appellees alone, and

not upon appellant's books. See our opening brief pp. 93-97. Which is all the more reason why an attempted exparte adjudication of appellant's rights from unsworn books or records kept or produced by others, without opportunity for inspection or cross-examination, should not stand. Mere written hearsay.

## GROUND 2

This injury done to the case law is without balancing consideration in arriving at a decision of this case under the rule in the Gibbs case. The procedure authorized by the Gibbs case as discretionary with the trial court cannot save the judgment appealed from reversal. Grant that it was within discretion for the trial court to combine the issues in bar of accounting, and the issues in accounting, all in one trial. What is the consequence? The record shows that the trial court did choose to proceed in the manner prescribed by the rule in the Benson-Rozelle case by trying the issues in bar of accounting first. Whether it pursued this course in deference to this court's ruling in Benson v. Rozelle, or as a matter of discretion, does not appear. Nor is it material, since this Court recognizes its right to so proceed in its discretion, even if not obliged to do so by jurisdictional considerations, and it will not review that discretion. In so doing, the trial court conducted a preliminary trial on the question of partnership, or no, ruled out all evidence in accounting, and sustained objections from both sides to questions by the other side seeming to call for matters in accounting. See our opening brief pp. 11-13 with record page citations.

No error is assigned, and no one is here complaining, that the trial court proceeded thus. All that this appellant need ask, if the rule in the Gibbs case is applied in this one, is that the trial court, having chosen its plan of procedure, do not depart therefrom at any stage of the trial to appellant's injury and disadvantage. That is, it should not in trying first the issue of partnership and liability to account and rejecting all evidence of either side as to matters in accounting, upon reaching its decision of the first matter, suddenly switch over to the opposite theory that all matters both in bar and in accounting are determinable in one trial and by one set of findings of fact, without ever hearing any evidence at all upon the accounting issues of the case. And we mean that the trial court did exactly that. And this Court will see it as we go along, or if it reads this record closely.

At the close of the preliminary trial on April 6, 1943 the trial court announced its decision that the several jobs were joint ventures. This Court in its opinion holds, upon the basis of *Wells* v. *Porter*, 205 Cal. 776, 272 Pac. 1039 that if the parties were joint adventurers they could not have been *partners* or employer-employees. If so, that ought to end this case in view that the plaintiffs alleged partnership, and the court found joint ventures, and the judgment should be reversed for the variance. But we are not dependent upon that issue alone for our right to a reversal in this case. Upon deciding that the jobs were joint ventures the trial court desired plaintiffs' counsel to prepare interlocutory findings and decree determining their right to an accounting, and inviting counsel to agree upon a referee to take the accounting. (rec. 303-308.)

Had the counsel complied and the court signed and filed such findings and decree, this appellant could have come at once to this court by appeal if the rule in Benson v. Rozelle was still the law. If not, he might still have resorted to certiorari or prohibition as the case might be.

But counsel did not so comply. At what point of time counsel began to mediate a change of tactics does not appear. The record merely shows that about three weeks later on April 24th, 1943 an order was signed and filed appointing Mr. Dansie as referee (rec. p. 74-76) and an amended order of reference on April 28, 1943 (rec. p. 78-79), without any findings of fact or decree to account having been signed, filed or entered, and without showing of their right to inspection of books and records.

Our opponent will say, of course, that the case having been sent to a referee, the right and opportunity to offer any evidence desired as to matters in accounting was preserved. We dispute that contention and say that no such opportunity was ever given to offer evidence in accounting before either the referee or the court. Not only the referee's report but the record of which it is a part shows this fact affirmatively and upon the face thereof. Wherefore the contention of opportunity afforded to present evidence and to make objections before the referee is unsupported by the record. And wherefore also the so-called referee report is null and void on its face. We speak of this more fully under Grounds 4 to 6 hereof.

## GROUND 3

We object to the holding in the court's opinion that the trial court's own findings of fact at the end of the entire trial in June 1943 was complete and responsive to each and all of the issues so as to sustain the judgment for $19,451.03 against appellant. And even if so, there was no evidence whatever to sustain such findings. We must remind that the issues were dual (1) as to partnership, and (2) as to evidence of debits and credits in accounting with balance struck. In view that there was never any evidence in accounting taken before the Court, how can it be said that the findings of fact embrace a decision or finding of fact upon those issues? A finding of fact upon no evidence at all within the accounting issues surely can not be treated as a valid adjudication of those facts or issues. The very fact that a referee was appointed and ordered to take an account upon evidence to be presented before him by the parties, shows that the court never undertook to hear evidence in that field on the basis of which it could possibly make findings of its own. The trial court could not make a finding of fact upon evidence which it never heard, and from testimony of witnesses whom it has never seen. If the referee conducted a trial, heard testimony and made findings, and had returned both findings and evidence into court; then the trial court would be in position to review the referee's findings in his report on the same evidence that the referee heard, and amend, add to, or set the same aside upon objections filed by counsel on either side. Unless such evidence was reported into court in some

form by the referee, the trial court could neither modify the referee's findings nor substitute findings of its own.

Let this distinction be borne in mind, viz: That a referee's report is not, in its very nature, cannot be, evidence of a fact. If valid at all, it is as an *adjudication* of *facts* by a judicial tribunal. It is the summary and adjudicated result of evidence produced prior thereto before the referee,—not the evidence itself. Just as the district court's own findings of fact constitute adjudication, not evidence. The referee's report or findings of fact, when filed in court have precisely the same function as do the trial court's own findings of fact when first filed in court. That is, they are tentative only, and subject to revision or amendment. Under Code 104-26-2 the court may *on motion* add to or modify its own findings of fact to conform them to the issues and evidence adduced at the trial. Under 104-27-6 the court may do the same thing with respect to the referee's findings of fact in his report when returned and filed in court. But, of course, he can not alter, set aside or modify a referee's findings in his report to make same conform to the evidence taken before the referee, unless that evidence has been preserved and returned into court by the referee with his findings of fact. In such case the trial court can only review the referee's findings to make them conform to *the issues* in the pleadings, at best.

In this case, no evidence before the referee was certified into court by bill of exceptions or otherwise. Hence it was not attempted to be modified or amended in any way because of non-conformity with evidence taken before the

referee. And it could not be lawfully changed or amended by evidence de novo before the district court. We apprehend that it is an unheard of thing in court procedure for a party dissatisfied with a jury verdict, or a court or referee's findings of fact, to attempt to assail the same by evidence de novo of the facts, either to reduce or increase the amount of the money recovery. His remedy is to either (1) move for a new trial, or (2) to show by the record of evidence already taken before the court that the amount of recovery in the court's findings should be increased or reduced. Or if it is a referee's finding, that the evidence before the referees requires such alteration. What would this Court think of an attempt by a litigant to offer evidence de novo either in the Supreme Court, or in the District Court, to add to, alter or modify the amount of a money recovery as fixed by the verdict or findings of fact in a case?

Ground 3 of our objections herein should be sustained.

## GROUNDS 4, 5 and 6

The referee's report was a nullity upon its face. It was neither evidence nor an adjudication of facts by a lawful tribunal acting within the scope of statutory authority. By statute a court may appoint a referee to sit as a court to hear evidence under oath, make findings of fact, and report the same with conclusions of law stated separately. Code 104-27-6. In an accounting case where the items of account are numerous and complex it is appropriate that the court appoint a competent accountant, but his duties remain the same, i.e., that he proceed judicially to conduct a public trial, and with due process of law.

This requires notice and opportunity to be heard and to produce witnesses and cross-examine those opposed.

Code section 104-27-6 is a legislative precaution to insure due process of law in trials before referees. It requires a referee to set a date for trial, notify the parties of the time and place at least ten days ahead, and enable them to prepare for trial. A referee is bound to obey this statute just as much as is the district court itself, in setting its cases for trial. A failure to comply deprives a litigant of due process and voids the proceedings.

Sec. 104-27-7 authorizes the referee to administer oaths to the witnesses at the trial. Sec. 104-39-8 authorizes a referee to sign and settle a bill of exceptions of the evidence before him and as well after as before he ceases to be such referee. Sec. 104-54-5 provides that the rules of evidence before a referee are the same as those in court trials. In *Reever* v. *White,* 8 Utah, 188, 30 Pac. 685 our Supreme Court held that a referee has power to grant a nonsuit for insufficient evidence.

The present statute (104-27-6) traces back to territorial days. Utah Rev. Stat. 1888, secs. 3388-3390 contained all the essentials of the present statute, notwithstanding changes in phraseology. Under the earlier statute the practice was:—

1. The referee tried the issues;
2. The referee reported his findings of fact and conclusions;
3. The parties filed any desired exceptions thereto in the trial court.

4. The court ruled on the exceptions and rendered judgment on the referee's findings.
5. The party alleging error filed his motion for new trial.
6. The trial court ruled on motion for new trial.
7. Appeal to the Supreme Court.

*Hanks* v. *Matthews*, 8 Utah, 181; 30 Pac. 504.

Now where a trial court has itself tried the case and heard the witnesses, he can remember the evidence and rule on a motion for a new trial on ground of no evidence or insufficient evidence. But where the evidence was produced before a referee, the trial court cannot do this unless the evidence before the referee has been preserved and reported back by the referee with his findings of fact and conclusions of law. In the absence thereof, the trial court must do what the Supreme Court does when a case comes up without a bill of exceptions,—i.e., presume that the evidence if preserved would support the findings. This, however, assumes that the referee has proceeded lawfully, given due notice, conducted a trial in the presence of the parties as required by the due process clause and by the state statute.

The failure of the referee to set a time for trial and give the parties notice of the time and place, or to conduct any public trial appears affirmatively by recitals upon its face and by his testimony on the face of the record of which his report is a part. Our statements of fact from the record and record page citations in this respect are set forth in our opening brief (rec. pp. 77 to 98), so we need not repeat.

"The constitutional guaranty of due process applies to both civil and criminal procedure, as well as to statutes regulating the same. This includes the right to notice and hearing before a competent tribunal."

16 Corp. Jur. Seg., page 1221, sec. 611 and citations.

"Questions of due process may be directed against the course and manner of judicial proceedings."

Id., p. 1221, sec. 611, note 57 and cases.

Due process includes the right to notice, not only with respect to the original summons and service thereof to bring defendant into court to answer,—

*Naisbitt* v. *Herricks*, 290 Pac. 950 (Utah).

*Riggins* v. *Dist. Court*, 51 Pac. 2d, 645, syl. 37; (Utah).

—but also with respect to interlocutory orders and proceedings which affect his rights.

*Hilton Bros. Motor Co.* v. *Dist. Court*, 82 Utah, 372; 25 Pac. 2d, 595.

*Cox* v. *Dixie Power Co.*, 16 Pac. 2d, 916 (Utah).

*Cupit* v. *Park City Bank*, 10 Utah, 294; 37 Pac. 564.

*Cupit* v. *Park City Bank*, 11 Utah, 427; 40 Pac. 707.

The Legislature may prescribe what notice shall be given which shall conform to "due process' requirements by affording an opportunity to be heard.

16 C. J. S. 1256, note 96, citing cases.

12 C. J., 1230, notes 32, 33 etc., and cases.

This our Legislature has done by section 104-27-6 and the referee was bound to obey and comply with it before proceeding to any sort of judicial investigation.

> The failure of the trial court itself to give a defendant notice of the time and place of trial was held to be a violation of the due process clause of the constitution, in
>
> *Timmerman* v. *Martin,* 176 Sou. (Ala.), 198.

And if so, it was just as much a lack of due process for the court's referee in this case to neglect the same step.

> Notice must be given of all essential steps in the proceedings.
>
> *Timmerman* v. *Martin,* supra, and
>
> Utah cases above cited.
>
> 16 C. J. S. p. 1222-3, note 64 and cases cited.

To illustrate. In deference to due process requirements, a defendant is duly summoned into court and the process returned and filed in court. The record is perfect and shows jurisdiction of the person and subject matter, and the court vested with full power and right to proceed and try the case. But suppose, at the moment the defendant enters the court room with his witnesses, they are seized by a burley court bailiff or deputy sheriff and gagged and bound, but permitted to remain in the court room and to hear every word that is said by his opponents and the court until the court has made and filed its findings of fact and conclusions of law. Would that be due process? If so, of what

value is due process to the man who is thus deprived of its benefits? Is he any better off than if he had never been served with a summons in the case? The record may look all right on its face, until attacked by evidence aliunde. If, however, the record is made to show by recitals on its face that the defendant was thus manhandled and abused, the judgment and all proceedings would be adjudged void upon its face.

What difference, in substance, is there between that situation and a case where either the court or its referee, after defendant answers and the case is ready for trial, slips off down the street or in a back alley, or to any unnoticed time or place, and proceeds to hold a trial, gather up gossip and hearsay, and come back into court and file something called a referee's report, or a finding of fact by the court based upon it?

As we stated, by citation from 16 C. J. S. 1221, sec. 611, the constitutional guaranty of due process applies to both civil and criminal procedure alike. In criminal cases this requires that the defendant be personally present in court at every step in the prosecution. In civil cases it only requires that the defendant have notice and opportunity to attend and defend. With that qualification, all that is said in either class of cases is applicable to each alike. Where due process is not observed the court or tribunal loses jurisdiction to proceed, and its acts are void. The tribunal loses its judicial character.

"When a court having jurisdiction over a prisoner denies him a constitutional right or immunity, its jurisdiction ceases and its acts are void."

16 C. J. S. sec. 246 page 182 note 78 citing:

*Miskimmins* v. *Shaver*, (Wyo.), 58 Pac. 411; 49 L. R. A. 831.

"The court may lose jurisdiction over the person of the defendant if it lets him go without day."

16 Corp. Jur., page 182, note 75 citing:

*State* v. *Grimes*, 141 Pac. 184 (Wash.).

"And, although a court has jurisdiction of a case, it may be shown that under the facts existing at the time the court assumed to act were such that the case was not within the jurisdiction of the court; and under such circumstances it is, of course, improper for the court to proceed further."

15 Corp. Jur. page 824, Courts sec. 135 note 71 citing:

*Pickering* v. *Pickering*, 21 N. H. 537;

*Ottawa Bank* v. *Roxborough*, 18 Ont. L. 511.

"Where the court having acquired jurisdiction has lost it, the same rule applies."

*Emery* v. *State*, 123 S. W. 133 (Tex.) citing:

*State* v. *Hall*, 49 Me., 412;

*Hamm* v. *Wickline*, 26 Ohio State, 81.

"There is another line of cases, well known and unbroken, to the effect that the judgment of the court is void where the court has gone in excess of and beyond its jurisdiction."

*Etheridge* v. *State*, 76 Tex. Crim. App. 473 at page 478; 175 S. W. 702, 86 A. L. R., 1136, note.

"A judgment is void on collateral attack where either of the following is lacking, viz:

1. A legal organization of the court or tribunal;
2. Jurisdiction over the subject matter;
3. Jurisdiction over the person;
4. Where one or more of these is lost after it once existed.

In any such case, the judgment and all rights and titles founded thereon are void even in the hands of a bona fide purchaser. The dignity of the court is of no concern.

*Pioneer Land Co.* v. *Maddux*, 42 Pac. 295, 297 (col. 2).

The referee's report shows on its face that due process was not accorded. The statute and constitutions were disregarded. These fight back and strike down the offending record and nullify it. It is a dead and lifeless thing. The district court has no power to adopt, add to, amend or modify it. The court does not even know on what evidence, if any, the referee based its report, save that, knowing the referee acted unlawfully, he had no judicial capacity to act upon any evidence. For his failure to get jurisdiction of appellant's person by giving him notice of a time and place for trial, he had no jurisdiction to determine any matter of fact, or to bind him by his attempted adjudication thereof. All his acts were void.

"A judgment absolutely void * * * may be attacked anywhere, directly or collaterally, whenever and wherever it presents itself, and either by parties or by strangers. It is simply a nullity, and can be neither a *basis* nor *evidence* of any right whatever."

*In re Pusey's Estate,* 181 Pac. 648, 650.

*Forbes* v. *Hyde,* 31 Cal. 342, 348.

*In re Christensen,* 53 Pac. 1003 (Utah).

*Jefferson* v. *Gallagher,* 150 Pac. 1071, syl. 5.

"A judgment rendered without jurisdiction of the person is no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair or create rights. As to the person in whose favor it professes to be it places him in no better position than he occupied before, and gives him no new right. As to third persons it can be neither a source of title, nor an impediment in the way of enforcing claims. *It is not necessary to take any steps to have it reversed, vacated or set aside.* Whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions and may be impeached in any action, direct or collateral. It is entirely void and may be shown to be void in a collateral as well as in a direct proceeding."

*Jefferson* v. *Gallagher,* 150 Pac. 1971 (Okla.).

And our Supreme Court declared the law in almost identical terms, in a case where the trial court lacked jurisdiction both of the person and subject matter. But

the lack of jurisdiction of either would have produced the same result. Thus:

> "A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be such in any collateral or other proceeding in which it may be drawn in question.
>
> "No appeal can be necessary from such a judgment. It is of no effect, and parties attempting to execute it are trespassers. A void judgment is in legal effect no judgment. From it no rights can be acquired. Being worthless in itself it neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale under its authority finds himself without title and without redress.
>
> "No intendment of law or presumption of fact can be made in favor of its jurisdiction, whether it be as to the *subject matter* or the *person of the defendant.*"
>
> *In re Christensen* (Utah), 53 Pac. 1003, 1006.

Concerning such a void judgment it has been held that:

> A judgment of affirmance thereof by the Supreme Court on appeal would not impart validity to it, but the judgment of affirmance would itself be void by reason of the voidness of the judgment appealed from.
>
> *Pioneer Land Co.* v. *Maddux,* 42 Pac. 295, 295;
>
> *Chambers* v. *Hodges,* 23 Tex., 105.
>
> It is not necessary to take any steps to have it reversed or set aside; but whenever it is brought up

against a party he may assail its pretensions and show its worthlessness.

*Jefferson* v. *Gallagher*, 150 Pac. 1071, syl. 5.

Likewise as to other public records of whatever nature. Thus as to tax sales and tax deeds, the Supreme Court of Utah has only recently held that,—

"A statement in a tax deed of a fact showing that it was improperly issued, is fatal to its validity."

*Telonis* v. *Staley*, 104 Utah, ... 106 Pac. 2d, 163 at page 175, quoting with approval from *Price* v. *Barnhill*, 98 Pac. 774 (Kan.);

*Wall* v. *Kaign*, 45 Utah, 244, 144 Pac. 1100.

*Ball* v. *Busch*, (Mich.) 31 N. W. 565, 570.

Likewise where the tax record produced in evidence showed that the assessment roll did not have the County Auditor's authenticating affidavit thereto attached, the tax deed and record were held void on their face.

*Equitable Life & Casualty Co.* v. *Schoewe*, 144 Pac. 2d, 526, (104 Utah).

## GROUND 7

We object to the statement in the opinion about conflicting evidence. In view of what has been said herein it is manifest that there was no conflict of evidence, insofar as the accounting procedure is concerned, to warrant the Court in invoking the rule of decision in *Stanley* v. *Stanley*, 97 Utah, 520, 94 Pac. 2d, 465. Recourse to that rule must have been due to some misapprehension.

We have shown before herein that the District Court never took any evidence on the accounting feature of the case, but referred the case to a referee to take evidence and report. The referee made some inquiries or investigations of an unofficial nature from sundry persons not under oath, and out of the presence of the parties or their counsel, except that at times the plaintiffs' attorney, Mr. Callister, was in some intimacy and abetting the referee in his non-judicial inquiries. Some two months later the referee's so-called report was produced from Mr. Callister's possession during a court session of some sort, where evidence was being produced, and filed it in the case (rec. p. 316). It purports to be or to contain *findings of fact* by the referee. It contains a number of schedules and tables.

The report is not accompanied by any certified statement or bill of exceptions by the referee setting out the evidence on which it professes to be based. It shows on its face that no such evidence, in a judicial sense, was ever produced, heard or considered. It shows that no trial was ever had, or notice given to parties of the time or place of trial. But had the referee acted with entire regularity in this respect, he never reported any evidence back to the court. Hence it could not possibly be determined, either by the district court or this Court, that there had been a conflict of evidence before the referee warranting an application of the rule in *Stanley* v. *Stanley,* 97 Utah, 520 as to a decision by the Supreme Court upon conflicting evidence. This Court has no means of knowing, judicially or otherwise, what the evidence was before the referee, hence whether conflicting or not. It does not know that there was

any evidence at all. Judicially, and in a legal sense, it is bound to know that there was no evidence at all before the referee, because he was without jurisdiction to sit and hear evidence without notice to the parties of the time and place of trial. The referee's report is void upon its face, hence there can be no presumptions in its favor, as we have seen by citations herein.

All right, then, where could the conflict of evidence have occurred on this accounting feature, to which the opinion refers? As we have stated, and we deem the proposition incontestable, there is no authority of law for the district court to have taken evidence on its own account in court, on the basis of which to overthrow the findings of fact by the referee. If convinced that the referee had proceeded illegally, so that his findings had no value, it might perhaps have quashed the report and set it aside, and proceeded to take evidence de novo covering the whole field of the accounting, as if the case had not been referred to a referee. This it did not do. If the referee's report was null and void on its face, it could not be added to or amended, not even if it was accompanied by a transcript of evidence taken ex parte. If it could be adjudged valid, then there is no authority of law for the district court to take evidence de novo upon which to add to, vary or modify the findings of fact by the referee based upon the evidence taken before him. The remedy would be to move for a new trial if dissatisfied with the amount found by the referee, which was $13,386.37.

Neither a jury verdict nor a court finding, or a referee finding can be increased in the trial court by new evidence

before the court. If so, this writer has never heard of it during nearly fifty years of practice. And if not, where could the conflict of evidence occur, warranting the rule of decision in equity cases in Stanley v. Stanley?

On the other hand, should it be contended that the referee's report being void on its face, the district court had the right upon its being filed in court, and its voidness noted, to have proceeded to hear evidence in accounting as if the case had not been referred to the referee. Or, which is the same thing in effect, treat the referee's report as merely advisory and make its own findings of fact. Then what? The answer is that the district court did not do any such thing. Nor did either party attempt to try the case over again, ignoring the referee's work. The district court's findings (rec. p. 83-90) do not on their face purport to rest upon a trial or evidence de novo. It professes on its face to rest upon the adjudication of facts by the referee in his report, if such it can be termed. Several pages of the tabulated figures in that report are copied bodily into the court's findings of fact. And the latter recites in paragraphs 2, 3 et seq. that the court *"adopts the referee's report in part and modifies the same in part."* (rec. p. 84.)

The report being void for want of due process of law in its preparation, could not be lawfully adopted in whole or in part. And even were it not void on its face, the district court could not adopt it in part and modify it in part, in the absence of a transcript of the evidence before the referee on which to test the correctness of the referee's findings. And the Court did not take any evidence in Court to take the place of what the referee may have

heard but did not certify into court. As we have stated, the District Court is without power to take evidence de novo in court as a basis on which to judge whether the referee's findings were supported by the evidence which the referee heard and considered, but did not report back to the court. If so, will some one please point out the section of our code or statutes where such statutory authority may be found. The district court cannot even do that in order to support its own findings of fact,—not to mention the referee's findings. When facts are once "found" or adjudicated, that ends the trial and all taking of evidence, until in some lawful way the findings are vacated and set aside and a new trial ordered. See Utah decisions under Utah Rev. Stat. 1933, secs. 104-26-2 and 104-26-3, same sections of U. A. C. 1943.

This does not mean that we assert the plaintiffs did not attempt to put in some evidence before and after the referee's so-called report was produced and filed in the district court by Mr. Callister. But we do say that the district court had no authority to receive it for the purpose of judging or modifying the referee's report. And we further say that such evidence was not in its nature, character or extent such as could take the place of that on which the referee attempted to act and make a finding. It did not attempt to furnish evidence of debits and credits, and balance, based upon transactions down to Sept. 3, 1942, upon which the district court could have made findings of fact, in lieu of those contained in the referee's report, yielding a balance of $13,386.37 or any other amount.

What the plaintiffs attorney did attempt to do was

to produce evidence of transactions after Sept. 3, 1942 that would enable him to enlarge the balance due from $13,386.37 found in the referee's report, to $19,451.03 as contained in the final judgment. Not only was this attempt ultra vires of the district court's powers, as we have shown, but there was no competent evidence of facts entitling plaintiffs to recover against appellant the additional or any other amount, even had the Court authority to consider it. If the Court, or any one, doubts this, or desires to satisfy himself, we respectfully refer to the proceedings of the second session of court beginning on record page 309 and to the end. It is too long to quote or condense. Anyone can read and masticate it.

## GROUND 8

In this ground we object to the implication or holding of the court's opinion that appellant by failure to object to the referee's report when produced in court and filed by Mr. Callister, thereby waived his right to question its effect whether as evidence or as a judicial adjudication of the facts. As a judicial record adjudication of facts, being void upon its face, it can be objected to at any time or place on direct or collateral attack. (ante pp. 20-25.) If treated merely as a piece of *evidence* (?), it has none of the criteria of evidence according to any tests in the law books. It is merely written hearsay reporting what some unknown and unsworn persons are reputed to have told the author of the report out of the presence of the parties or their counsel. As such, it has no value whether in or out of the record.

We further assert that, if treated as evidence, it is incorrect to assume that any such item or document becomes valid evidence to prove anything claimed for it, by its proponent, simply because it is not objected to by the party against whom it is offered. Error does not usually lie to the mere admission of offered evidence that is claimed to be incompetent, except in jury trials. In equity trials the chancellor is presumed to know the rules of evidence and give to a document only such value and weight as it on its face is entitled to.

Let us illustrate: Suppose in an action by A against an insurance company B to recover an annuity payable to A during the life of C. At the trial A undertakes to prove that C is still alive by producing C in court. C is brought in, but it is his dead body with rigor mortis, death palor, and odor from partial decomposition. B does not object to the corpse being admitted in evidence. Is B therefore precluded from contending that C is dead because his cadaver was offered and admitted in evidence without objection?

At a murder trial, the defendant pleads not guilty and denies the corpus delicti, claiming that the supposed victim is yet alive. He produces the victim's corpse with a bullet hole in his head, and it is admitted without objection from the State. Is the State precluded thereby from contending that the man is dead?

We need not rely upon possible but suppositious cases. We take one now from a case but recently decided by this Court. In *Buhler* v. *Maddison*, 140 Pac. 2d, 933 (to appear in 104 Utah) the plaintiff sued his employer for personal

injuries sustained in his employment, on the ground that the employer had failed to provide workmen's compensation insurance. The services and injury occurred in Nevada. The plaintiff therefore offered in evidence part of the Nevada compensation statute similar to the Utah statute, imposing liability for injuries where the employer fails to provide compensation insurance. The Nevada statute was admitted in evidence *without objection* from defendant employer. But this did not prevent our Utah Supreme Court from weighing and considering the evidence and rendering judgment against the plaintiff on the ground that the offered statute did not make out a case for the plaintiff. Yet if the rule applied in the opinion at bar had been applied in that case, the defendant would have been precluded from objecting to the effect of the Nevada statute by his failure to object to its admission in evidence, and this Court must have given it all the effect claimed for it.

Scores of cases like this, in principle, might be cited. Thus in cases involving tax titles, or suits upon void judgments, and the like, it may be to the interest of a party not to object to the admission in evidence of the tax record, or the judgment record, knowing full well that it is void and will so appear upon its face. But that does not estop him to deny that the record is void, not any more than would the admission of a corpse in evidence without objection prevent him from saying that the man is dead.

In *Equitable Life & Cas. Co.* v. *Schoewe*, 144 Pac. 2d, 526, 105 Utah ..., the tax record produced in evidence showed that the tax sale was void because the assessment roll produced in evidence without objection did not have

the County Auditor's affidavit attached thereto as required by law.

The fact is that a plaintiff may sue to cancel a void tax sale, or a void judgment, for defects appearing upon its face. It is then to his interest to produce in evidence the void record to prove his averment that the sale or judgment is void. It is therefore admitted in evidence "without objection" from him. Is he therefore precluded from contending that the record is void? Yet the case is no different from what it would be if the same void record was offered in evidence by his opponent and admitted without his objection, knowing full well that it would prove its own voidness and invalidity.

> "A statement in a tax deed showing that it was improperly issued is fatal to its validity."
>
> *Price* v. *Barnhill,* 79 Kan. 93, 95, 98 Pac. 774 (quoted with approval in *Telonis* v. *Staley,* 106 Pac. 2d, 163, at page 175 (104 Utah . .)
>
> *Wall* v. *Kaign,* 45 Utah, 244; 144 Pac. 1100.
>
> "The legislature did not intend to say that a paper shall be held prima facie valid when it carries upon its face the evidence that shows it was void."
>
> *Ball* v. *Busch,* 64 Mich. 336, 31 N. W. 565, 570 (quoted with approval in *Telonis* v. *Staley,* supra, and in *Wall* v. *Kaign,* supra).
>
> "Thus, where a tax deed shows by recitals on its face that the property was sold to the County at a competative sale, the sale and deed were void. The law does not authorize such a thing to be done."
>
> *Wall* v. *Kaign,* supra.

And finally, the motion for a new trial gave the trial court full opportunity to weigh the evidence in all its aspects and to consider whether its judgment could be supported upon the entire record. (rec. p. 96.)

## GROUND 9

This ground comprehends all the foregoing 1 to 8.

## GROUNDS 10 and 11

This ground involves a disregard of our statute U.A.C. 1943, Title 69, Chapter 1, which however is discussed in our separate petition and brief for modification filed herewith, to which reference is made to avoid repetition.

## GROUND 12

The Court by its opinion affirmed a judgment for $19,451.03 without any evidence to support it, and without any finding of fact by either the court or referee that can sustain it, or sustain any finding if made. The so-called finding by the Court depends not upon evidence before the Court warranting such a judgment as that, but upon a finding by the referee that is void upon its face. It contains no presumptions in its favor. It may be resisted at all times and places whether on direct or collateral attack. See cases ante p. 20-25.

The void referee report, it is claimed, recommends a judgment against appellant for $13,386.37. The appellees claiming to be dissatisfied with the amount, sought to increase it by evidence before the court, after the referee's

void report was returned and filed. The report being void, could not be added to, modified or amended. If it could be treated as valid, then appellees should have sought a remedy by motion to vacate it and grant a new trial, or by a motion to review it upon the evidence taken before the referee, if that evidence was preserved by certified transcript or bill of exceptions. There was no authority of law for the district court to hear evidence to enlarge and supplement the amount found by the referee in his report, no matter whether the report be valid or void. Not any more than could the district court hear evidence to enlarge the recovery in a jury verdict returned into court. There is neither evidence nor finding of fact to sustain either the referee's $13,386.37 nor the court's enlargement thereof up to $19,451.03. The district court exceeded its jurisdiction in permitting the attempt to so enlarge the recovery, and also in including the referee's $13,386.37 in its judgment.

The judgment appealed from should be reversed.

Respectfully submitted,

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